80-2159

Office-Supreme Court, U.S.
FILED
JUN 19 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

ROBERT C. LEHMAN,
Petitioner,
v.
E. B. WEISS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does an allegation that a Federal official deprived the owner of personal property without due process of law by destroying it without giving notice required by agency regulations, state a claim comprehended within *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), even though adequate post deprivation process is available?

PARTIES TO THE PROCEEDINGS

1. Petitioner is Robert C. Lehman. Mr. Lehman was a Defendant in the District Court, and Appellant in the Court of Appeals for the Ninth Circuit.

2. Respondent E.B. Weiss was the Plaintiff in the District Court and Appellee in the Court of Appeals for the Ninth Circuit.

3. Wayne LaRue was a Defendant in the District Court; however, he was held not liable to Plaintiff, and an appeal was not prosecuted from the judgment in his favor. He is therefore deemed not to be a party in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Robert C. Lehman petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1981, and appears at pp. 1a-6a of the Appendix to this Petition. It is reported at 642 F.2d 265.

The Judgment of the United States District Court for the District of Idaho, entered on July 15, 1978, upon a jury verdict of July 14, 1978, appears at p. 7a of the Appendix; the verdict form appears at p. 8a. There is no reported decision of the District Court.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 26, 1981. The time for filing a petition for writ of certiorari was extended successively until June 10, and June 20, 1981, by Orders of Mr. Justice Rehnquist entered on April 16 and June 3, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Petitioner Robert C. Lehman is a District Ranger in the United States Forest Service, Department of Agriculture. Respondent E. B. Weiss brought this action in the United States District Court for the District of Idaho against Lehman and another Forest Service employee, Wayne LaRue. The gravaman of the Complaint was that Lehman and LaRue had destroyed certain property left in the Idaho Panhandle National Forest (or St. Joe National Forest) to which Weiss claimed ownership.

The original Complaint alleged jurisdiction solely on the ground of diversity of citizenship, under 28 U.S.C. § 1332; it asserted that Lehman and LaRue "unlawfully, intentionally, maliciously and without right destroyed personal property belonging to the plaintiff . . . ." Weiss sought compensatory damages of $48,000 and punitive damages of $100,000.

Lehman and LaRue moved for summary judgment on the grounds that they were absolutely immune from

suit under the doctrine of *Barr* v. *Matteo*, 360 U.S. 564 (1959), and alternatively, if they enjoyed only a qualified immunity, their actions in disposing of unsightly items, which they considered to be "junk" or "debris" were in good faith and the action should be dismissed.

In response to this motion, Weiss amended his Complaint, to allege jurisdiction under 28 U.S.C. § 1331, based on a federal question, rather than diversity, and to add the following (Second Amended Complaint, ¶ IV):

> "The alleged acts . . . constituted a taking of plaintiff's property without due process of law, in violation of plaintiff's Fifth Amendment rights under the United States Constitution, and as a result plaintiff has been damaged in the amount of Forty-eight Thousand ($48,000.00) Dollars."

On October 5, 1977, the District Court entered a brief order (App. 9a-10a)[1] concluding that the Complaint stated a claim on which relief could be granted and "that the defendants are not entitled to judgment as a matter of law on the immunity issue."

At trial, the principal issue was the nature and value of the materials which Lehman had caused to be buried. The facts were essentially these: From approximately 1961 to 1967, a company known as Continental Rare Metals leased a placer mine in the St. Joe National Forest, Idaho, from the claimants of the mine. In April 1967 its lease expired, and sixty days later, machinery and other materials it had left at the mine site reverted to the claimants (Tr. 98-99). Thereafter, a junk dealer hauled off various items which Continental had left (Tr. 71).

According to Plaintiff Weiss, subsequently, in June 1971, he acquired from one of the mine claimants, one

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[1] "App." refers to the Appendix to this Petition. "Tr." refers to the transcript of the trial.

James Click, the rights to certain materials not removed by the junk dealer. His interest in these materials was not recorded, nor did he pay personal property tax on them (Tr. 510).

Lehman became District Ranger for the Red Ives District, St. Joe National Forest, in 1972 (Tr. 6). Prior to Lehman's arrival, contacts had been made by the Forest Service with the mine claimants, and the file led Lehman to conclude that "the mining claimants did not want anything to do with that junk," which had been at the site for six years (Tr. 30-31). Lehman was told by a superior, the Regional Forester, to get this site—"a black eye in this area"—cleaned up (Tr. 24-25). The same subject had been discussed with other Forest Service employees, as well as hikers and fishermen. Lehman also came to the independent conclusion that it should be cleaned up (Tr. 24-28). Lehman caused certain remaining materials—consisting primarily of three collapsed bus bodies that had been sitting unused at the site at least since Continental's departure six years before—to be buried on May 8, 1973 (Tr. 15, 22, 31).

Because Lehman considered the materials to be mere unsightly "junk" or debris, he did not publish a notice of the proposed destruction (Tr. 29-31). The Forest Service Regulations call for such publication and impoundment for a period before "personal property" is destroyed;[2] there is no similar requirement that publication precede a clean-up of debris. If material is considered debris, the Forest Service issues a citation if it knows who left it; otherwise it cleans up the debris itself (Tr. 31). Lehman did not notify the mine claimants, or Weiss (of whose alleged interest he was not aware) of the prospective destruction. Lehman testified that if the materials were "within question" he would have gone through the notice procedure, but in his judgment these materials were "of no value" (Tr. 33).

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[2] *See* 36 C.F.R. § 262.4.

At trial, Weiss contended that actually valuable property worth $48,000 had been destroyed; Lehman and LaRue contended that the materials involved were worthless (Tr. 33, 65). The jury, after initially indicating that it was deadlocked (Tr. 583), returned a verdict of $1,000 against Lehman and nothing against LaRue.[3]

On Lehman's appeal, the Ninth Circuit affirmed (App. 1a-6a; 642 F.2d 265). It noted that "[t]he sole issue presented by this appeal is whether a *Bivens*-type damage remedy was properly implied against defendant Lehman, a Forest Service employee, under the Fifth Amendment due process and just compensation clauses." *Id.* at 266. Although recognizing that "[t]he Tucker Act [28 U.S.C. § 1346(a)(2)] and Fifth Amendment just compensation clause . . . do provide an alternative remedy" (*id.* at 267), the Ninth Circuit held that that remedy did not preclude a *Bivens*-type action based upon a taking of property without due process of law.

REASONS FOR GRANTING THE WRIT

This case presents the issue with respect to actions of Federal employees, which parallels the one decided as to actions of State employees in *Parratt* v. *Taylor*, —— U.S. ——, 49 U.S.L.W. 4509 (May 18, 1981). *Parratt* held that a suit generally does not lie under 42 U.S.C. § 1983 against State employees to obtain redress for actions constituting a taking of property, where some other remedy affords due process after the taking has occurred. Petitioner submits that the availability of an implied remedy against Federal employees under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for alleged takings of property without due process of law, is an issue of similar importance to the one decided in *Parratt*.

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[3] The District Judge ruled that as a matter of law there had been an insufficient showing for the award of punitive damages and declined to instruct the jury as to such damages (Tr. 580).

There is no apparent ground for implying a remedy under *Bivens*, where none would lie under the Civil Rights statutes against State employees. In *Butz* v. *Economou*, 438 U.S. 478, 498-499 (1978), this Court held that Federal officials should receive "no greater degree of protection from *constitutional* claims than their counterparts in state government," citing with approval Court of Appeals decisions finding it " 'incongruous and confusing' " to have different standards of immunity in § 1983 and *Bivens* cases.[4] It has never been thought that the *Bivens* remedy could be *more* expansive than that of § 1983. It would seem illogical that rights of action created by implication could be greater than those available under a broad, remedial Civil Rights statute.

The reasoning of *Parratt*—which was decided after the Ninth Circuit's ruling in this case—applies fully here. It was held that post deprivation remedies provided by State tort law afforded due process to the plaintiff. The Tucker Act, 28 U.S.C. § 1346(a)(2), at least as clearly provides "due process," and as effective a means of obtaining compensation for a "taking" by a Federal official of property of the nature involved here,[5] as did the State remedies available in *Parratt*.

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[4] A very substantial argument can be made, as it was by the four dissenting Justices in *Butz* v. *Economou*, 438 U.S. at 517-530, that the rights of action against Federal officials under *Bivens* are subject to limitations (*e.g.*, ones of immunity doctrine) not pertaining to § 1983 actions.

[5] As "destruction is tantamount to taking," *United States* v. *General Motors Corp.*, 323 U.S. 373, 384 (1945), there is no doubt that a Tucker Act claim could be maintained. There also appears to be available an additional remedy comporting with due process under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). *See Hatahley* v. *United States*, 351 U.S. 173 (1956) (wrongful destruction of horses actionable under Federal Tort Claims Act).

Although the Ninth Circuit's Opinion in this case analyzed the issue in the terms of *Carlson* v. *Green*, 446 U.S. 14 (1980),

The question presented here is important and recurrent. Indeed it already has recurred in the Ninth Circuit. In *Seguin* v. *Eide*, 645 F.2d 804 (9th Cir. 1981), a Customs Agent was held personally liable under *Bivens*, on a similar deprivation of property without due process theory, for delaying the referral to the United States Attorney for possible forfeiture proceedings of an automobile allegedly involved in smuggling. Surely the multiplication of such suits against Federal officials may trivialize the principle of *Bivens* and quite unnecessarily burden the Federal courts.

CONCLUSION

The Petition for Writ of Certiorari should be granted, and the judgment below should be reversed.

Respectfully submitted,

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June 1981

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and rested on a conclusion that a Tucker Act remedy is not "equally effective" as a *Bivens* suit (642 F.2d at 267), *Parratt* establishes that, where the allegation is one of deprivation of property without due process the focus is somewhat different, *i.e.*, whether the alternative remedy provides due process. If it does, no remedy against State officials lies under 42 U.S.C. § 1983 and none can be implied under the Fifth Amendment and *Bivens* against Federal employees.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-4101

E. B. WEISS,
Plaintiff-Appellee,
v.

R. C. LEHMAN and WAYNE LARUE,
Defendants-Appellants.

Argued and Submitted Nov. 7, 1980

Decided Jan. 26, 1981

As Amended March 30, 1981

Appeal from the United States District Court
for the District of Idaho

Before: VAN DUSEN,* FARRIS and BOOCHEVER, Circuit Judges.

FARRIS, Circuit Judge:

The sole issue presented by this appeal is whether a *Bivens*-type damage remedy was properly implied against defendant Lehman, a Forest Service employee, under the Fifth Amendment due process and just compensation clauses.[1] We affirm.

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* Honorable Francis L. Van Dusen, Senior United States Circuit Judge, for the Third Circuit, sitting by designation.

[1] Jurisdiction in the trial court was first alleged under 28 U.S.C. § 1332 (1976) (diversity); that jurisdictional allegation was later amended to an allegation under 28 U.S.C. § 1331 (1976) (federal question). Jurisdiction on appeal is based on 28 U.S.C. § 1291 (1976).

I. FACTS

Lehman appeals an adverse judgment in a suit against him for damages for destruction of certain personal property located on an unpatented mining claim on federal land. The claim had been leased in 1967-68 to Continental Rare Metals, which contracted with Weiss to construct a dredge for a mining operation. When Continental's lease expired, it did not remove its equipment, which reverted to the mine claimants under the terms of the lease. Certain of the "scrap" metal and parts were later traded to Weiss by one of the mine claimants in exchange for a lease on a dredge at another mining site. Weiss's interest in the claim was unrecorded.

Lehman, as a U.S. Forest Service employee, drew up a plan to dispose of the property on the mining claim in 1973. Under Lehman's direction, Forest Service workers buried or removed most of the property on the claim and closed the access road.

Weiss's suit against Lehman was tried to a jury on the issue of whether Lehman was entitled to qualified immunity. The jury answered that question by awarding a verdict for Weiss in the sum of $1,000 damages plus costs.

Lehman argues on appeal that the Tucker Act, 28 U.S.C. §§ 1346(a)(2), 1491 (1976 & Supp. II 1978), in conjunction with the Fifth Amendment just compensation clause, provided an equally effective alternative remedy for Weiss.[2] *See Carlson v. Green*, 446 U.S. 14 (1980).

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[2] In light of *Carlson v. Green*, 446 U.S. 14 (1980), decided following submission of briefs in this case, Lehman has abandoned his contention that the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2680 (1976), provides an equally effective alternative remedy.

II. ANALYSIS

The availability of implied causes of action for money damages against federal officers in their individual capacities for violation of constitutional rights was established in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (Fourth Amendment violation). The *Bivens* Court reasoned that when "no special factors counsell[ed] hesitation in the absence of affirmative action by Congress," *id.* at 396, and when "no explicit congressional declaration [required] that persons so injured . . . be remitted to another remedy, equally effective in view of Congress," *id* at 397, a plaintiff injured by a federal officer's violation of his constitutional rights was entitled to recover money damages. Although the Supreme Court had earlier reserved judgment on the applicability of *Bivens* to other constitutional violations by federal officers, *see Butz v. Economou*, 438 U.S. 478, 486 n.8 (1978), its two most recent decisions found neither special factors counselling hesitation nor equally effective alternative remedies. *Carlson v. Green*, 446 U.S. 14, 18-19 (1980) (due process, equal protection, and Eighth Amendment violations); *Davis v. Passman*, 442 U.S. 228, 245-48 (1979) (Fifth Amendment due process violations).

A. *Special Factors Counseling Hesitation*

First, we must determine whether "special factors" counsel hesitation in implying a *Bivens*-type remedy. Specifically, we must assess whether Lehman occupies such an "independent status" in our constitutional scheme to render a judicially-created remedy against him inappropriate. *Carlson v. Green*, 446 U.S. 14, 19 (1980). Lehman, as a Forest Service employee, does not occupy a position of such constitutional stature that

implication of a damages remedy against him will significantly impair his ability to perform public functions, *see Butz v. Economou*, 438 U.S. 478, 507 (1978). *Cf. Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (federal marshals). *But cf. Bishop v. Tice*, 622 F.2d 349, 357 & n.16 (8th Cir. 1980) (availability of civil service remedies for wrongfully discharged federal employee was special factor counseling hesitation); *Bush v. Lucas*, 598 F.2d 958, 961 (5th Cir. 1979) (same), *vacated*, 446 U.S. 914 (1980) (in light of *Carlson*). He was adequately protected by the availability at trial of a qualified immunity defense. *See Butz*, 438 U.S. at 506-07.

B. *Equally Effective Alternative Remedy*

Second, we must determine whether relief under the Tucker Act-Fifth Amendment just compensation clause is both an alternative and "equally effective" remedy to a *Bivens*-type action.

The Tucker Act provides in relevant part that:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution . . . .

28 U.S.C. § 1491 (1976 & Supp. II 1978). *See id.* § 1346 (a)(2) (district courts have concurrent jurisdiction when claim does not exceed $10,000). The Tucker Act is jurisdictional only; the source of a substantive right enforceable against the United States for money damages must be found elsewhere. *United States v. Testan*, 424 U.S. 392, 398 (1976). That substantive right is provided by the Fifth Amendment just compensation clause for one whose property is taken by the govern-

ment, *e.g.*, *United States v. Causby*, 328 U.S. 256, 267 (1946); *Jacobs v. United States*, 290 U.S. 13, 16 (1933), whether the property so taken is either real or, as here, personal, *e.g.*, *King v. United States*, 427 F.2d 767, 769, 192 Ct. Cl. 548 (1970). The Tucker Act and Fifth Amendment just compensation clause, then, do provide an alternative remedy.[3]

We must next determine whether the Tucker Act-Fifth Amendment remedy is equally effective to the *Bivens*-type remedy. *Under Carlson v. Green*, 446 U.S. 14, 18-19 (1980), the proper inquiry is whether Congress has provided an explicitly declared substitute remedy. Here, Congress has not declared the Tucker Act-Fifth Amendment remedy to be exclusive. *Cf. Carlson*, 446 U.S. at 19-20 (Congress explicitly declared F.T.C.A. to be an alternative to, rather than a substitute for, a *Bivens*-type remedy).

Additional factors support our determination that a *Bivens*-type remedy is appropriate. *See Carlson*, 446 U.S. at 20-23. The deterrence of unconstitutional acts by government officers is better served by the *Bivens*-type action, since damage recovery is against the federal officers individually, than by the Tucker Act-Fifth Amendment claim against the United States. *See id.* at 21. The *Bivens*-type action is also superior to the Fifth Amendment claim made under the Tucker Act because, as here, it provides for trial by jury. *See, e.g., United States v. Sherwood*, 312 U.S. 584, 587 (1941) (Court of Claims' procedure may be restricted to nonjury trials when Congress consents to suit against the United States). *See also Carlson*, 446 U.S. at 22-23.

The Tucker Act-Fifth Amendment just compensation claim is less than equally effective to the *Bivens*-type

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[3] The appropriate court in which to bring such a claim would depend on the alleged value of the property taken. *See* 28 U.S.C. § 1346(a)(2) (1976 & Supp. II 1978).

remedy here. This conclusion comports with our prior decisions implying causes of action directly under the Fifth Amendment due process clause. *E.g., Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980) (First, Fifth, and Eighth Amendments); *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1363-64 (9th Cir. 1978) (on denial of rehearing), *aff'd in part and rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). *Accord, Micklus v. Carlson*, 632 F.2d 227, 235-36 (3d Cir. 1980).

Affirmed.

JUDGMENT ON JURY VERDICT CIV 31 (7-63)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil Action File No. 3-75-36

E. B. WEISS

vs.

R. C. LEHMAN and WAYNE LaRUE

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Ray McNichols, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, this 14th day of July, 1978,

It is Ordered and Adjudged That the Plaintiff, E. B. Weiss take nothing against the Defendant Wayne LaRue and it is

FURTHER ORDERED AND ADJUDGED That the Plaintiff, E. B. Weiss, receive Judgment assessed against the Defendant R. C. Lehman in the sum of One Thousand and no/100 Dollars ($1,000.00) actual damages together with Costs in the amount of $216.50.

Dated at Moscow, Idaho, this 15th day of July, 1978.

JERRY L. CLAPP
Clerk of Court

by /s/ Loa Jean Barden
LOA JEAN BARDEN
Deputy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff

vs.

R. C. LEHMAN and WAYNE LaRUE,

Defendants.

VERDICT

We, the Jury, find in favor of:

1. The defendant, R. C. LEHMAN, and against the plaintiff

No

(Yes or No)

2. The defendant WAYNE LaRUE, and against the plaintiff

Yes

(Yes or No)

(If you answer BOTH 1 and 2 above "Yes", do not continue, but date and sign the form. If you answer either 1 or 2 above "No", answer question number 3 below.)

3. The plaintiff, E. B. WEISS, and against the (defendants [marked out]) (defendant), and assess the plaintiff's actual damages in the sum of $1,000.00.

(Mark through the word that does NOT apply.)

July 14, 1978
(Date)

/s/ Harold E. Harman
HAROLD E. HARMAN
(Foreman)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 3-75-36

E. B. WEISS,

Plaintiff,

v.

R. C. LEHMAN and WAYNE LARUE,

Defendants.

ORDER

This matter is before the Court on a motion of the defendants for summary judgment and on a cross-motion of the plaintiff for the Court to determine the issues of jurisdiction and the applicable statute of limitations.

The basis for the prayer for summary judgment is the contention that the defendants as employees of the United States acting in their official capacity in carrying out the alleged wrongful acts were absolutely immune from suit, or at least had a qualified immunity.

Defendants by answer have also challenged the jurisdiction of the Court and have alleged that the cause of action is time-barred by the applicable statute of limitations. Plaintiff in its cross-motion asks the Court to rule on these issues.

Briefs and documentary showings have been filed and examined. No oral argument is required.

Under the showing made to support the motion for summary judgment, I conclude that the defendants are not entitled to judgment as a matter of law on the immunity issue.

It appears that the Court has jurisdiction and that the applicable state of Idaho three-year statute of limitations had not run.

IT IS THEREFORE ORDERED:

1. That the motion of the defendants for entry of summary judgment is denied.

2. That the complaint states a claim upon which this Court can grant relief.

3. That the Court has subject matter jurisdiction.

4. That the claim of the plaintiff is not time-barred by the applicable statute of limitations.

Dated: October 5th, 1977.

/s/ Ray McNichols
RAY MCNICHOLS
Chief Judge
U.S. District Court
District of Idaho